

D.C. Circuit Upholds EPA's Mercury and Air Toxics Standards

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On April 15, 2014, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) issued a decision upholding the U.S. Environmental Protection Agency's (EPA) Mercury and Air Toxics Standards (MATS) governing emissions of hazardous air pollutants (HAPs) from existing coal- and oil-fired electric generating units, including mercury, arsenic, chromium, nickel and acid gases. *White Stallion Energy Center, LLC v. EPA*, No. 12-1100 (D.C. Cir., Apr. 15, 2014).

While the decision is important in that it clears the way for implementation of standards that will result in significant reductions in emissions of both HAPs and criteria pollutants from existing coal-fired electric generating units starting next year (with possible extensions of compliance deadlines until April 16, 2017), the ruling is not particularly noteworthy, but rather reflects the Court's deference to EPA's discretion to make the threshold determination required by the Clean Air Act (CAA) on whether regulation of power plant HAP emissions was appropriate and then impose maximum achievable control technology (MACT) standards for such emissions. The ruling is most notable for holding that, in requiring EPA to determine whether regulation of electric generating unit HAP emissions was "appropriate" in the first instance, the CAA does not mandate consideration of costs and EPA's failure to consider such costs was permissible.

Background

In 2000, EPA initially determined that regulation of electric generating unit HAP emissions was appropriate and necessary under Section 112(n) of the CAA based on the harmful effects of emissions of mercury. However, EPA reversed its decision in 2005, when it decided to regulate mercury emissions from electric generating units under a cap-and-trade program instead. That decision and trading program, known as the Clean Air Mercury Rule, was vacated by the D.C. Circuit in 2008 because EPA had failed to satisfy the criteria for delisting a source category, before embarking on the new market-based approach. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Then, under the Obama Administration, EPA reversed its decision again and promulgated MATS on February 16, 2012.

A total of 30 petitions for review, including petitions brought by 24 states, were filed in the D.C. Circuit challenging MATS. These petitions were consolidated under *White Stallion Energy Center v. EPA*, No. 12-1100 (D.C. Cir.), although the case was subsequently severed into three separate briefing schedules: one addressing the "new unit" MATS standards; one addressing issues of work practice standards applicable during periods of startup and shutdown; and, finally, the one addressing the existing unit standards. While the new unit standards and work practice standards are still being

litigated in the D.C. Circuit under separate dockets, the existing unit standards were upheld in their entirety in yesterday's decision.

CAA Does Not Mandate Consideration of Costs in Threshold Determination That Regulation of Electric Generating Unit Emissions Is Appropriate

The CAA requires EPA to conduct a study of the public health hazards attributable to power plant HAP emissions and then decide whether regulation of such emissions is "appropriate and necessary". The most important issue decided by the Court was whether, in delineating that EPA must make this appropriateness and necessity determination, the CAA required EPA to consider the cost of regulation in making such determination. The Court found that it does not, particularly given that cost is expressly required to be considered in other subparagraphs of the same section of the CAA. *White Stallion Energy Center, LLC v. EPA*, No. 12-1100, slip op. at 22 (D.C. Cir., Apr. 15, 2014). The Court relied in part upon Supreme Court precedent establishing that EPA is under no obligation to consider costs in establishing national ambient air quality standards (NAAQS) under other provisions of the CAA that likewise fail to mention cost as a relevant consideration.

Judge Kavanaugh dissented on this point, asserting that cost should always be considered in establishing regulation. *Id.* at 29. In Judge Kavanaugh's view, "[i]t is entirely unreasonable for EPA to exclude consideration of costs [—which, according to Judge Kavanaugh, "are huge, about \$9.6 billion a year—that's billion with a b"—] in determining whether it is 'appropriate' to regulate electric utilities under the MACT program." *Id.* at 5 (Kavanaugh, J., dissenting). The majority dismissed Judge Kavanaugh's argument as amounting to little more than "[a]cademic generalities" that do not reflect Supreme Court precedent, but criticisms of such precedent. *Id.* at 29.

The Court also decided that EPA was allowed to consider environmental effects alongside health effects in making this threshold determination. *Id.* at 31. It also found that EPA was not required to base its determination on the emissions from power plants alone, but could consider health and environmental effects that were exacerbated by power plant emissions and that, once the threshold determination was made, EPA could proceed to regulate electric generating units under the same general paradigm as other sources and set standards for *all* HAPs (not just mercury). *Id.* at 32-35.

On several industry challenges to how EPA went about establishing the standards, the Court consistently deferred to EPA's technical judgment. This included challenges to EPA's determination of what was achievable by the best performing 12% of sources (i.e., the "MACT floor") and the data that supported this conclusion (*id.* at 41-42), as well as its decision to set more stringent standards (i.e., "beyond-the-floor") for a certain subcategory of units (i.e., lignite-burning power plants). *Id.* at 48. The Court also denied petitions from environmental groups, which argued that MATS was not stringent enough because it allows averaging among units at the same source and only requires testing once every three years for certain low-emitting units. *Id.* at 52-56. Finally, the Court also dismissed a petition from an oil and natural gas production company, which had argued that EPA should have required "fuel switching" (from coal to natural gas), because the company's interests in seeking more stringent regulation fell outside the "zone of interests" Congress intended to protect in the CAA. *Id.* at 61. Judge Kavanaugh concurred in this decision, but wrote separately to emphasize the "confusion in our case law" on whether competitors rightly fall within the zone of interests protected by a statute, which he said was as predictable as a "coin flip". *Id.* at 17, 29 (Kavanaugh, J., dissenting).

Conclusion

The D.C. Circuit's decision is not particularly groundbreaking in its application of well-worn principles of administrative law and CAA jurisprudence to MATS. Rather, its significance lies in upholding a rule that mandates massive reductions in both HAPs and fine particulate matter (PM_{2.5}) from power plants over the next several years. Given that the majority's decisions are rooted squarely in the statute, governing principles of administrative law and the discretion afforded to EPA by them—and particularly given that the central holding relies heavily upon Supreme Court precedent touching directly upon EPA's obligation to consider costs under the CAA—the chances are slim that yesterday's ruling will be overturned upon a petition for *writ of certiorari* to the U.S. Supreme Court.

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